IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CARA LESLIE ALEXANDER, et al.,	
Plaintiffs,	
v.	Civil Action Nos. 96-2123/97-1288 (RCL)
FEDERAL BUREAU OF INVESTIGATION, et al.,	**CONSOLIDATED ACTIONS**
Defendants.	

SUPPLEMENTAL MEMORANDUM IN SUPPORT OF GOVERNMENT DEFENDANTS' MOTION TO STRIKE PLAINTIFFS' CLASS ACTION ALLEGATIONS, AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

STATEMENT

Plaintiffs have brought this Privacy Act suit against the Executive Office of the President ("EOP") and the Federal Bureau of Investigation ("FBI") (collectively, "government defendants"), allegedly on behalf of a class of "former U.S. Government employees, whose confidential FBI files were improperly obtained from the FBI by the White House." Complaint, Alexander v. FBI, No. 96-2123 (D.D.C.) (Sept. 12, 1996), ¶ 15.[1] Privacy Act claims such as plaintiffs' are particularly ill-suited for class actions, however, as this case well illustrates; and certification should therefore be denied and plaintiffs' class allegations stricken. Far from promoting "economies of time, effort, and expense," what

[1] By Order dated October 17, 1997, the Court consolidated Alexander with the later filed Grimley v. FBI, No. 97-1288 (D.D.C.). For purposes of this memorandum, the allegations in Grimley are identical in all material respects to the allegations in Alexander.

class certification is supposed to accomplish,[2] certification of this litigation as a class action would lead only to a series of mini-trials which would unnecessarily protract the resolution of this case.

A jurisdictional requirement of plaintiffs' Privacy Act claims is that each plaintiff must have suffered some "adverse effect" caused by the alleged violation of the Act's provisions. In this case, plaintiffs claim that the government defendants' actions have caused them an adverse effect in the form of emotional and mental injuries. Accordingly, class membership turns on the subjective emotional and mental state of each putative member, as well as other individualized questions, the resolution of which would ensnarl the Court in hundreds of "mini-trials." Indeed, the asserted class is so overbroad and improperly defined as to make it virtually impossible to ascertain the contours of the putative class.

Because plaintiffs' alleged emotional and mental injuries and their causes are intractably subjective and variable, plaintiffs cannot satisfy the typicality requirement of Rule 23(a) of the Federal Rules of Civil Procedure. Plaintiffs also cannot meet the Rule's adequate representation prerequisite, as the interests of the broad, amorphous class are divergent, and plaintiffs' counsel's handling of the case demonstrates that counsel cannot adequately protect the interests of a class. In addition, the numerous individualized issues presented, such as whether the FBI even possessed or disclosed information regarding each potential class member, whether each plaintiff has suffered a cognizable "adverse effect" within the meaning of the Privacy Act, and whether the class members incurred compensable damages, would overwhelm the few issues common to the proposed class members' claims. Accordingly, because plaintiffs cannot satisfy Rule 23(b)(3), class certification must be denied.

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[2] Fed. R. Civ. P. 23, Advisory Committee Notes.

PROCEDURAL HISTORY

Plaintiffs brought this action on September 12, 1996, alleging that the EOP and the FBI violated plaintiffs' rights under the Privacy Act, 5 U.S.C. § 552a, and that Messrs. Nussbaum, Livingstone and Marceca and First Lady Hillary Rodham Clinton committed the common-law tort of invasion of privacy. Alexander Compl. ¶¶ 30-33, 35-37, 39-41. The complaint was brought as a putative class action under the provisions of Rules 23(a) and 23(b)(3) of the Federal Rules of Civil Procedure. Id. ¶ 14. Plaintiffs define the proposed class as "former U.S. Government employees, whose confidential FBI files were improperly obtained from the FBI by the White House." Id. ¶ 15.

The government defendants moved to strike plaintiffs' class action allegations, and plaintiffs moved to certify the class.[3] In its June 12, 1997 Memorandum Opinion, the Court expressed doubts about the suitability of plaintiffs' claims for class litigation, and identified defects in the proposed class definition. Memorandum Opinion (June 12, 1997) ("June 12, 1997 Mem. Opinion") at 19-21. Notwithstanding these reservations, the Court deferred ruling on class certification, concluding that plaintiffs should have the opportunity to take some limited discovery. Id.; Memorandum and Order (Apr. 21, 1999) ("April 21, 1999 Mem. & Order") (re: additional depositions) at 2. By subsequent order, the Court initially allowed six months "to complete all discovery relating to class certification" (and scope of employment), and limited each side to twenty depositions. Memorandum and Order (Aug. 12, 1997) ("August 12, 1997 Mem. & Order").

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[3] Gov't Defs. Mem. of Points and Authorities in Support of their Motion to Strike Class Action Allegations in Plaintiffs' Complaint (Jan. 17, 1997); Pl. Opp. to Gov't Defs. Motion to Strike Class Action Allegations in Plaintiffs' Complaint and Mem. of Points and Authorities in Support of Motion for Class Certification ("Pl. Motion for Class Certification") (Feb. 21, 1997).

Without objection from plaintiffs, the Court dismissed plaintiff Patrick Adam Beers ("Beers") from the case because the FBI did not possess a background investigation file on him and, thus, did not disseminate any information about him to the White House. June 12, 1997 Mem. Opinion at 8. The Court also granted government defendants' motion for summary judgment as to plaintiffs Michael John Grimley ("Grimley") and David Lee Black ("Black") because EOP never requested and the FBI never provided copies of previous FBI summary background investigation reports for either Grimley or Black. Memorandum Opinion (March 31, 1999) (re: Grimley and Black) ("March 31, 1999 Mem. Opinion") at 4-8. A fourth plaintiff has been dismissed voluntarily. Stipulation of Dismissal of Claims by Plaintiff Linda Skladany (June 16, 1998) ("Stipulation of Skladany Dismissal").

Following more than a year of discovery, plaintiffs moved for leave to depose an unspecified number of additional individuals during the initial phase of discovery.[4] The Court only granted plaintiffs leave for five additional depositions (in addition to the 28 depositions that plaintiffs had either taken or had received leave to take) and set June 12, 1999 as the deadline for completing the initial phase of discovery. April 21, 1999 Mem. & Order at 7-8.[5] The Court explained that, in allowing plaintiffs 22 months of discovery and over 30 depositions, it had given them "more than satisfactory leeway to fully examine the issues of class certification and scope of employment." Id. at 6. The Court also concluded that any further extension of discovery on class certification "would run afoul of [the] Fed. R. Civ. P. 23(c)(1) standard for class certification." Id.; see also Fed. R. Civ. P. 23(c)(1) ("[a]s soon as

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[4] Pl. Motion for Authorization to Take Additional Depositions (Oct. 14, 1998).

[5] The Court later authorized a limited extension for completing discovery. See Order (June 22, 1999).

practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained").

In their Supplemental Memorandum Concerning Substitution and Class Certification ("Pl. Suppl. Mem."), plaintiffs' entire argument concerning class certification appears to be an afterthought. It occupies just over eight (8) pages at the very end of plaintiffs' 135-page document. See Pl. Suppl. Mem. at 127-135.

STATUTORY PROVISIONS

The Privacy Act of 1974 governs the acquisition, maintenance, and control of information by federal agencies about individuals. As a threshold matter, the Act applies only to "records" maintained in a "system of records" by a federal "agency" (as each of those terms is defined by the statute and case law) that are retrieved by the name or other identifying information of the individual. 5 U.S.C. § 552a(a). The Act limits what information agencies may maintain about individuals, requires that agencies establish appropriate safeguards to insure the confidentiality of records within its scope, and limits agencies' authority to disclose information from those records about individuals. Id. §§ 552a(b), (e)(1) & (e)(10).

Plaintiffs seek relief under a civil remedies provision of the Privacy Act that grants federal courts jurisdiction to hear claims that an "agency" subject to the Act has failed to comply with the Act's requirements if the plaintiff establishes that the agency's action had an "adverse effect" on him or her. Id. § 552a(g)(1)(D). A plaintiff cannot recover damages unless he or she additionally proves both that the agency "acted in a manner which was intentional and willful" and that the individual sustained "actual

damages." Id. § 552a(g)(4).[6]

ARGUMENT

I. PLAINTIFFS HAVE FAILED TO SHOW THAT CLASS CERTIFICATION IS APPROPRIATE

A. THE STANDARDS FOR CLASS CERTIFICATION

A litigant seeking class certification must justify the use of a litigation device that is "an exception to the usual rule." General Telephone Co. of Southwest v. Falcon, 457 U.S. 147, 155 (1982) (quoting Califano v. Yamasaki, 442 U.S. 682, 700 (1979)). As a threshold matter, the putative class for which certification is sought must meet a standard that is not explicit in Rule 23, but is implicit in the availability of the class action as a tool of judicial efficiency in litigation: the proposed class must be ascertainable and manageable; i.e., susceptible to precise definition. See, e.g., Lewis v. National Football League, 146 F.R.D. 5, 8 (D.D.C. 1992) (Lamberth, J.) (clearly defined class is necessary "to ensure that the class is 'neither amorphous, nor imprecise'") (internal citation omitted). The class definition "must make it 'administratively feasible for the court to determine whether a particular individual is a member.'" Rodriguez v. U.S. Dept. of Treasury, 131 F.R.D. 1, 7 (D.D.C. 1990) (citing cases); see also 7A Wright & Miller, Fed. Practice and Procedure § 1760 at 120-21 (2d ed. 1986) (citing cases).

Plaintiffs must also demonstrate that the proposed class satisfies each of the four requirements

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[6] Plaintiffs inaccurately describe the damages provision applicable to this case. See Pl. Suppl. Mem. at 131. The Privacy Act provides that a plaintiff can recover for "actual damages . . ., but in no case shall a person entitled to recovery receive less than the sum of $1,000." 5 U.S.C. § 552a(g)(4)(A). Contrary to plaintiffs' suggestion, the $1,000 minimum does not eliminate the requirement of proving that a plaintiff is entitled to recovery in the first place. See, e.g., Dickson v. Office of Personnel Management, 828 F.2d 32, 37 (D.C. Cir. 1987) (plaintiff must prove either actual damages or entitlement to the $1,000 minimum recovery).

of Rule 23(a) of the Federal Rules of Civil Procedure, namely, that

> (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a).

In addition, the class claims must fit within at least one of the categories set forth in Rule 23(b). In this case, plaintiffs claim that their proposed class satisfies Rule 23(b)(3), which requires

> that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

Fed. R. Civ. P. 23(b)(3); see Alexander Compl. ¶ 20.

Plaintiffs bear the burden of proof with respect to satisfying each of the requirements of Rule 23(a) and establishing compliance with Rule 23(b). See In re American Medical Sys., Inc., 75 F.3d 1069, 1086 (6th Cir. 1996) (reversing the district court which had erroneously asked the defendants to show why a class should not be certified); McCarthy v. Kleindienst, 741 F.2d 1406, 1414 n.9 (D.C. Cir. 1984). "Strict adherence to those prerequisites [of Rule 23] is necessary to avoid unfairness to the defendant and to protect the interests of potential class members who may assert timely, representative claims in the future." Sperling v. Donovan, 104 F.R.D. 4, 9 (D.D.C. 1984). Plaintiffs must establish that a class action would "advance 'the efficiency and economy of litigation which is a principal purpose of the procedure.'" Falcon, 457 U.S. at 159 (quoting American Pipe & Constr. Co. v. Utah, 414 U.S. 538, 553 (1974)). The Court is to undertake a "rigorous analysis" of whether Rule 23(a) has been satisfied, because "actual, not presumed, conformance with Rule 23(a) [is] . . . indispensable." Falcon,

457 U.S. at 160-61.

Further, while an undue inquiry into the merits of the class claims is not appropriate in adjudicating class certification, "an analysis of the nature of the proof which will be required at trial is 'directly relevant to the determination of whether the matters in dispute are principally individual in nature or are susceptible of proof equally applicable to all class members.'" Rodriguez, 131 F.R.D. at 8 (internal citation omitted); see also, e.g., Coopers & Lybrand v. Livesay, 437 U.S. 463, 469 (1978) ("class determination generally involves considerations that are 'enmeshed in the factual and legal issues comprising the plaintiff's cause of action'") (internal citations omitted); Wagner v. Taylor, 836 F.2d 578, 587 (D.C. Cir. 1987) ("some inspection of the circumstances of the case is essential to determine whether the prerequisites of . . . Rule 23 have been met. Necessarily, the court must examine both the claims presented and the showing in support of class certification for their adherence to the requirements of Rule 23.") (footnotes omitted).

In addition, even if the requirements of Rule 23 are satisfied, the decision of whether to certify a class is firmly committed to the trial court's discretion. See Yamasaki, 442 U.S. at 703. For the reasons stated below, plaintiffs are unable to carry their heavy burden of showing that class certification is appropriate.

B. NO SUFFICIENTLY DEFINED OR ASCERTAINABLE CLASS EXISTS BECAUSE IDENTIFYING MEMBERS OF PLAINTIFFS' PROPOSED CLASS IMPROPERLY DEPENDS ON EACH PERSON'S INDIVIDUALIZED EMOTIONAL AND MENTAL STATE

Plaintiffs' proposed class definition fails to meet the most basic standard -- it is not an ascertainable and manageable class. See Lewis, 146 F.R.D. at 8. The nature of plaintiffs' Privacy Act

claims dictates that plaintiffs' class definition turns on each member's particular emotional and mental state, and, accordingly, is far from precise or manageable.

As a jurisdictional prerequisite to suit under the provision of the Privacy Act on which plaintiffs rely, a party must have suffered an "adverse effect" caused by a violation of a provision of the Act. 5 U.S.C. § 552a(g)(1)(D); Quinn v. Stone, 978 F.2d 126, 131, 135 (3d Cir. 1992) ("adverse effect" is in effect a standing requirement); Tijerna v. Walters, 821 F.2d 789, 794 (D.C. Cir. 1987); Albright v. United States, 732 F.2d 181, 184, 186 (D.C. Cir. 1984).[7] Plaintiffs claim that they have suffered "adverse effects" in the form of a variety of amorphous injuries, namely "emotional distress, mental anguish, loss of reputation, embarrassment, inconvenience, and unfairness," as a result of defendants' actions. Alexander Compl. ¶ 33 (Count I re: FBI).[8]

At the outset, therefore, simply in order to identify the members of the class, the Court would have to answer for each potential class member several fact-intensive questions: (1) whether that person suffered "distress," "anguish," or "embarrassment," and (2) whether such adverse effect was caused by defendants' actions, rather than another source. Courts have readily recognized that class

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[7] The question of whether a plaintiff has suffered an adverse effect, see 5 U.S.C. § 552a(g)(1)(D), which is an element of proving a Privacy Act violation, is separate from the additional question of whether -- assuming that liability is established -- a plaintiff has suffered "actual damages" and is entitled to monetary relief. See § 552a(g)(4)(A). In Albright, for example, the D.C. Circuit stated that a plaintiff must establish both that the agency's action caused "adverse effects" and that the plaintiff suffered actual damages. 732 F.2d at 184. The court further stated that, although emotional trauma alone is sufficient to establish the threshold question of adverse effect, the issue of whether emotional trauma alone would entitle a plaintiff to recover actual damages was a separate question. Id. at 186.

[8] Plaintiffs' alleged injuries caused by EOP are apparently fewer, but similar: "emotional distress, mental anguish, and loss of reputation." Alexander Compl. ¶ 37 (Count II).

certification is improper when it turns on the putative class members' state of mind. See Simer v. Rios, 661 F.2d 655, 669 (7th Cir. 1981) (refusing to certify a class of persons "eligible" for assistance and "discouraged" from applying, in part because identification of members would require ascertaining each person's state of mind and render the class unmanageable)[9] (citing cases); Rodriguez, 131 F.R.D. at 7 (resolving each putative class member's state of mind "obviously would call for innumerable 'mini-trials,'" making class certification inappropriate); Rios v. Marshall, 100 F.R.D. 395, 403 (S.D.N.Y. 1983) (although it is not rare for a court to make determinations of a particular party's state of mind, doing so for a class would require the court to make "an unmanageable number of such determinations"); 7A Wright & Miller, Fed. Practice and Procedure § 1760 at 126-27 (2d ed. 1986) (citing cases).

Indeed, one of the cases cited by plaintiffs illustrates this very point. Plaintiffs claim that "class action treatment is appropriate where the putative class is identifiable by reference to the objective conduct of the parties." Pl. Suppl. Mem. at 128 (citing Grossman v. Waste Management, Inc., 100 F.R.D. 781, 784 (N.D. Ill. 1984) (securities fraud action)). Yet here plaintiffs' proposed class cannot be identified simply by reference to the parties' objective conduct. To the contrary, it will depend largely on the subjective emotional and mental state of each putative class member. Accordingly, a readily identifiable class does not exist in this case. Cf. Grossman, 100 F.R.D. at 784-85.

Plaintiffs also allege that part of the adverse effects that they have suffered are "out-of-pocket

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[9] As discussed infra at 30-31, the court in Simer also discussed the failure of the proposed class to satisfy Rule 23(b)(3), which overlapped with the court's discussion of the unmanageable task of identifying a class whose membership depends on individualized states of mind. 661 F.2d at 671-74.

expenses and loss of time necessarily incurred in investigating and responding to Defendants' unlawful conduct." Alexander Compl. ¶¶ 33, 37. However, deposition testimony and documents produced by plaintiffs have established that claimed economic losses stem from plaintiffs' decisions to pursue litigation or from plaintiffs' reactions to media coverage of the FBI files matter, and not from the alleged wrongful disclosure or maintaining of records.[10]

Accordingly, such expenses and loss of time do not constitute "adverse effects" stemming from an agency's "failure to comply" with the Privacy Act. See 5 U.S.C. § 552a(g)(1)(D); Albright v. United States, 558 F. Supp. 260, 264 (D.D.C. 1982) (finding no evidence that out-of-pocket expenses were directly attributable to alleged violation of Privacy Act), aff'd, 732 F.2d 181 (D.C. Cir. 1984). Indeed, if the legal expenses and loss of time incurred in bringing a Privacy Act suit were sufficient to establish an "adverse effect" within the meaning of the statute, such an "adverse effect" would obviously exist in every lawsuit, and it would be pointless for Congress to have required an "adverse effect" as a jurisdictional element.

In any event, in order to determine whether plaintiffs suffered economic "adverse effects" that

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[10] See, e.g., Deposition of Cara L. Alexander (May 13, 1998) ("Alexander Dep.") at 97-114, 119 (expenses of telephone calls, faxing documents to counsel, faxing and obtaining medical records for discovery, transportation to counsel's office and to deposition, babysitter services during deposition), 101-03, 115-17, 160 (time spent on telephone since FBI files story became public, telephone conversations with counsel, time devoted to lawsuit) (excerpts at Def. Exh. 1); Alexander's litigation expense tally, receipts (Def. Exh. 2) (filed under seal); Deposition of Marjorie Bridgman (May 14, 1998) ("Bridgman Dep.") at 132-34, 136-38, 140-42 (expenses of transportation to counsel's office, telephone calls to counsel, faxing and copying medical records, time spent preparing for deposition, traveling to counsel's office, thinking) (excerpts at Def. Exh. 3); Bridgman's litigation expense tally, receipt (Def. Exh. 4) (filed under seal). (Citations herein to "Def. Exh." refer to Exhibits in Support of Government Defendants' Motion to Strike Plaintiffs' Class Action Allegations, and in Opposition to Plaintiffs' Motion for Class Certification, filed herewith).

were caused by the FBI's alleged disclosure or EOP's receipt of information about them, the Court would have to engage in individualized inquiries that would necessitate a plethora of mini-trials.

The statutory "adverse effect" and causation prerequisites necessarily and irreducibly require fact-specific adjudications of each person's situation before he or she can be identified as a class member. In this case, the class action device becomes no more economical or efficient than separate trials. Because a class defined by the members' mental and emotional state would not be administratively feasible, certification should be denied.

C. PLAINTIFFS' PROPOSED CLASS IS NECESSARILY UNMANAGEABLE, OVERBROAD AND IMPROPERLY DEFINED

A class whose definition turns on each plaintiff's state of mind is only one of the many defects of the proposed class definition. The nature of plaintiffs' Privacy Act claims against EOP and the FBI give rise to other intractable problems of individualized determinations. As a threshold matter, the Act applies only to "records" maintained in a "system of records" by a federal "agency" (as each of those terms is defined by the statute and case law) that are retrieved by the name or other identifying information of the individual. 5 U.S.C. § 552a(a). To determine the contours of the class, the Court would have to determine for each putative class member: (1) whether an FBI background investigation file even existed for that individual, (2) whether a "record" — i.e., a background investigation summary report — was, in fact, disclosed by the FBI to the White House, (3) whether the individual's summary report was obtained by EOP while that individual continued to require White House access, and (4) if not, whether there was nevertheless a justification for the disclosure.

The Court has already dismissed three plaintiffs from the case, either because the FBI did not

possess a background investigation file on the individual, or because EOP never requested and the FBI never provided copies of background summary reports on those individuals. See June 12, 1997 Mem. Opinion at 8 (dismissing Beers); March 31, 1999 Mem. Opinion at 4-8 (dismissing Grimley and Black). In opposition to government defendants' motion for summary judgment as to Grimley and Black, plaintiffs argued that they need to take additional discovery, a position that serves as an indication of the protracted nature of making individualized determinations for each putative class member. See Pl. Opp. to Gov't Defs. Motion for Summary Judgment as to Plaintiffs Grimley and Black (March 30, 1998). Although the Court rejected plaintiffs' request, in granting government defendants' motions, the Court was required to examine the individual factual circumstances of each of these putative plaintiffs. The net result was that, out of an initial set of eight named plaintiffs, three have proven to be improper plaintiffs and one other has been dismissed voluntarily. See Stipulation of Skladany Dismissal.

Moreover, EOP made requests for previous summary reports from the FBI on a host of individuals for whom the FBI had no information and, therefore, did not disclose any material to the White House. See Responses and Objections to Plaintiffs' Third Set of Interrogatories to EOP (July 16, 1999) at 3-4 & Exh. A (Exh. 56 to Pl. Suppl. Mem.). EOP also obtained background summaries on individuals who continued to hold active passes to the White House complex. See id. at 4 & Exh. B. Persons in both of these categories are not members of a class consisting of those "whose confidential FBI files were improperly obtained from the FBI by The White House." See Alexander Compl. ¶ 15; see also March 31, 1999 Mem. Opinion at 2 (if certified, the alleged class would consist of "those people whose FBI files were requested by the Executive Office of the President and released

by the FBI without proper justification").[11] If plaintiffs intend to contest government defendants' evidence regarding whether and when particular individuals' summary reports were disclosed, as they have done for Black and former White House usher Chris Emery ("Emery"), then, to determine class membership, the Court would have to make such fact-intensive individual determinations for each proposed member, frustrating the intent of efficient case management and judicial economy.

Plaintiffs' proposed class is also impossibly overbroad and amorphous. Overbroad classes are unacceptable because the binding effect of a judgment may result in the loss of claims of absent members. Falcon, 457 U.S. at 161 (noting unfairness to class members bound by judgment if framing of class is overbroad). In the complaint, plaintiffs define their proposed class as "former U.S. Government employees, whose confidential FBI files were improperly obtained from the FBI by the White House," without any limit as to date, or where within the U.S. government the former employees worked. See Alexander Compl. ¶ 15. The Court has already noted the absence of any time-frame limitation as one of its many concerns with plaintiffs' class definition. June 12, 1997 Mem. Opinion at 20. During the 26 months since the Court pointed out the numerous deficiencies in plaintiffs' proposed class definition, plaintiffs have done nothing to attempt to remedy the problems, as their Supplemental

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[11] In their supplemental memorandum, plaintiffs incorrectly describe the putative class they seek to have certified as "those individuals who worked in the Reagan and Bush administrations whose FBI background materials were improperly requested by The White House Office of Personnel Security." Pl. Suppl. Mem. at 135 (emphasis added). Of course, as plaintiffs themselves recognize, if the FBI did not disclose and the White House did not obtain a copy of an individual's FBI background report, there can be no Privacy Act violation. See generally, Alexander Compl.; Pl. Motion for Class Certification at 4 (class "can only consist of White House employees in the Reagan and Bush administrations, about whom confidential information was improperly disclosed by the FBI and improperly acquired and maintained by the White House and the individual Defendants, in 1993 and 1994").

Memorandum continues to use the flawed class definition from the complaint.[12] See Pl. Suppl. Mem. at 127.

Indeed, plaintiffs' Supplemental Memorandum demonstrates the unacceptable elasticity that plaintiffs envision in their proposed class definition. Plaintiffs suggest that individuals such as Linda Tripp ("Tripp") and Emery are members of the putative class. See Pl. Suppl. Mem. at 132. But, Tripp is not a "former U.S. Government employee," and the White House obtained Tripp's and Emery's FBI background summary reports, in the normal course of conducting the Update Project, while both continued to require access to the White House. See Suppl. Mem. in Support of the Attorney General's Certification as to Scope of Employment and of the United States' Motion to Dismiss Under the Westfall Act (Oct. 1, 1999) at 28, 38-39, 117-18, 144-45. Because the EOP's acquisition of their background summary reports was unquestionably proper, neither Tripp nor Emery can legitimately be part of a class that alleges violations of the Privacy Act.

Indeed, it is for these reasons that the Court has already held that the obtaining of FBI summary reports of then-current Clinton Administration employees, such as Tripp, Kathleen Willey and Emery, is not even relevant "because this information does not pertain to plaintiffs in this lawsuit. Plaintiffs' claims are based on the misuse of the FBI files of former government employees." Memorandum and Order (May 17, 1999) (re: William Kennedy) at 8 (emphasis added). Thus, the Court has limited plaintiffs' proposed class to "former Bush or Reagan Administration employees who would not need White House access." Id.

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[12] As discussed supra at 8-13 and infra at 16-20; 26-31, many of the definitional defects are inherent in the nature of this Privacy Act action and render a class action inappropriate.

The Court has also recognized that plaintiffs' proposed class definition impermissibly turns on a disputed contention - whether or not FBI background reports were "improperly acquired." June 12, 1997 Mem. Opinion at 20. Conclusory allegations that fail to define the proposed class with particularity are legally insufficient under Rule 23. See Johnpoll v. Thornburgh, 898 F.2d 849, 852 (2d Cir. 1990). Under plaintiffs' definition, the Court would have to adjudicate whether each class member's FBI file was "improperly obtained" in order to determine the threshold question of class membership. This ambiguous element in the definition fails to meet the requirement of an adequately defined and clearly ascertainable class. In other words, the proposed class definition is so indefinite as to require the Court to decide cases on their individual merits merely to decide class membership. Such an arrangement is hardly "administratively feasible." See Simer, 661 F.2d at 669; Davoll v. Webb, 160 F.R.D. 142, 145-46 (D. Colo. 1995) (proposed class of persons with "disabilities" necessarily includes individualized inquiries and makes class definition "untenable"). Furthermore, if the merits of each individual case have to be decided before it can be determined whether an individual is a class member, a class offers no benefits of judicial economy over just deciding the merits of each individual claim in separate cases.

Because the proposed class is inherently unmanageable and imprecisely defined, certification should be denied.

D. PLAINTIFFS HAVE FAILED TO ESTABLISH THAT THE PROPOSED CLASS MEETS THE TYPICALITY PREREQUISITE OF RULE 23(A)(3)

Rule 23(a)(3) requires plaintiffs to establish that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). Plaintiffs allege that

their claims are typical because "the right of each Plaintiff to relief arises from the improper disclosure by the FBI . . . of information in Plaintiffs' FBI files" and the "improper obtaining and maintaining of that information" by EOP. Alexander Compl. ¶ 18. Because plaintiffs' claims are inherently individualized, they cannot satisfy the typicality requirement.

As discussed above, plaintiffs cannot maintain their Privacy Act suit unless they demonstrate that they have suffered some "adverse effect" caused by the alleged violation of the Act. See supra at 9. Class certification is inappropriate, however, when the alleged adverse effect is injury to members' emotional or mental state, because such an injury is necessarily individual in nature and cannot be "typical" of an entire class. As one court stated in denying certification of a class of persons who allegedly had suffered various injuries, including "emotion pains, anguish, and distress," any injuries suffered by the proposed class would be dependent on a number of variables present, but "[t]his is even more clearly the case when one considers the alleged class claim for emotional distress, which is intractably individual in character." Commonwealth of Puerto Rico v. M/V Emily S., 158 F.R.D. 9, 14 (D.P.R. 1994) (denying certification in part because typicality requirement was not satisfied) (emphasis added); see also Sanna v. Delta Airlines, 132 F.R.D. 47, 50 (N.D. Ohio 1990) (noting that "[c]ourts have been hesitant to find 'emotional injuries' typical" and denying class certification request by airline passengers claiming physical and emotional injuries); Ikonen v. Hartz Mountain Corp., 122 F.R.D. 258, 263 (S.D. Cal. 1988) (in suit by pet owners for damages suffered by their pets, Rule 23(a)(3)'s typicality requirement was not satisfied because each pet would have been injured in different ways and each pet owner, who allegedly suffered emotional distress, would have been affected in different ways and to different degrees).

Furthermore, in order to maintain an action under subsection (g)(1)(D) of the Privacy Act, plaintiffs must demonstrate that any adverse effect was caused by defendants' conduct rather than some other source. See, e.g., Quinn, 978 F.2d at 131, 135 (to maintain suit under (g)(1)(D), plaintiff must show causal nexus between disclosure and adverse effect); Dickson, 828 F.2d at 37 ("adverse effect must be proximately caused by the Privacy Act violation") (citing cases). Accordingly, the Court would have to engage in case-by-case inquiries to determine whether each class member's alleged "adverse effect," whether emotional or economic, was in fact caused by defendants' allegedly improper conduct. See Ikonen, 122 F.R.D. at 263 (typicality not met in part because court must decide proximate cause in each individual case); Commonwealth of Puerto Rico, 158 F.R.D. at 13 (class action inappropriate where plaintiffs must show causal link between each individual's injury and defendants' actions). Necessarily, the class action would degenerate into a mass of individual lawsuits.

The difficulty that arises when the definition of a class would depend on each member's state of mind is that

> [t]he focus of the class litigation with regard to these individuals would most certainly shift from defendants' conduct to the factual circumstance of individual plaintiffs. This tendency . . . outweighs any commonality and typicality established by the claims of actual applicants, and therefore, frustrates the interest of judicial economy which class litigation is designed to serve.

Rodriguez, 131 F.R.D. at 7.

None of the cases cited by plaintiffs in support of their typicality argument, see Pl. Suppl. Mem. at 132-33, involves claims for emotional distress or mental anguish, either as an element of establishing liability, as in this case, or as the basis for damages. By contrast, in each of the cases cited herein, where the parties were alleging injury claims analogous to those of plaintiffs, the court held that the

representative plaintiffs' claims were not typical of the entire class because the injuries and damages were necessarily individual. See, e.g., Commonwealth of Puerto Rico, 158 F.R.D. at 13-14; Sanna, 132 F.R.D. at 50; Rodriguez, 131 F.R.D. at 7.

The highly individualized nature of demonstrating an adverse effect caused by a violation of the Privacy Act is well-highlighted by plaintiffs' deposition testimony. For example, plaintiff Joseph Duggan ("Duggan") testified that from 1993 to mid-1996, around the same time when the FBI files matter became public, he was dealing with the break-up of his marriage and a stress-inducing divorce for which he sought counseling and therapy. Deposition of Joseph P. Duggan (June 8, 1998) ("Duggan Dep.") at 160-62 (excerpts at Def. Exh. 5). The Court would have to decide whether the emotional distress and mental anguish that Duggan alleges were caused by his divorce or by defendants' alleged actions. Plaintiff Cara Alexander ("Alexander"), on the other hand, testified that she incurred only various minor, out-of-pocket expenses in connection with pursuing this litigation, as well as spent time speaking with her family and dealing with the lawsuit.[13] See supra at 11 n.10. Accordingly, plaintiff Alexander has not suffered a cognizable "adverse effect" because her alleged economic losses are attributable to her decision to bring this suit, and not to defendants' disclosure and maintaining of her FBI background report, see id. at 10-11, (a conclusion that can only be reached after a fact-specific analysis). The necessity of engaging in similar fact-intensive determinations for each individual starkly demonstrates the absence of the typicality prerequisite. The difficulty of satisfying Rule 23's typicality

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[13] Alexander's claims for non-economic damages have been stricken by the Court. See Memorandum and Order (June 15, 1998) ("June 15, 1998 Mem. & Order") (re: protective order and plaintiffs' document production) at 4.

requirement for an entire class is also illustrated by plaintiffs' inability to gather even eight class representatives who are similarly situated. See supra at 12-13.

Indeed, plaintiffs would have the Court certify a class that is even broader, and would include individuals such as Tripp and Emery. But it is impossible for plaintiffs to demonstrate how the claims of the class representatives, which arise from the release of their FBI summary reports by the FBI to EOP after they no longer needed access to the White House, are typical of the vastly broader, undefined claims of Tripp[14] and Emery. See supra at 15; General Telephone Co. of Northwest v. EEOC, 446 U.S. 318, 330 (1980) (Rule 23(a)(3)'s typicality requirement limits "class claims to those fairly encompassed by the named plaintiff's claims").

Because the Privacy Act's prerequisites to suit require individualized factual determinations, and because plaintiffs' putative class is broad and amorphous, plaintiffs' proposed class does not satisfy the typicality requirement of Rule 23(a)(3).

E. PLAINTIFFS HAVE NOT ESTABLISHED THAT THE INTERESTS OF THE CLASS WILL BE FAIRLY AND ADEQUATELY PROTECTED

Plaintiffs also bear the burden of showing that they can "fairly and adequately protect the interests of the class," as required by Rule 23(a)(4).[15] See Fed. R. Civ. P. 23(a)(4). The adequacy of

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[14] Several days ago, Tripp filed her own lawsuit against the White House. See Tripp v. EOP, et al., No. 99-CV-2554 (D.D.C. Sept. 27, 1999).

[15] Plaintiffs incorrectly assert that the defendant bears the burden of demonstrating inadequacy of representation. See Pl. Suppl. Mem. at 133 (citing Johns v. Rozet, 141 F.R.D. 211, 217 (D.D.C. 1992)). The case upon which plaintiffs rely cites a circuit court opinion that involved a shareholder derivative action, under Fed. R. Civ. P. 23.1. See Lewis v. Curtis, 671 F.2d 779, 788 (3d Cir. 1982). In contrast, the issue of class certification in this case is governed by the distinct

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representation requirement involves a constitutional due process dimension because of the binding effect of a final judgment on absent class members. National Ass'n of Regional Medical Programs, Inc. v. Mathews, 551 F.2d 340, 345-46 (D .C. Cir. 1976). Accordingly, the court should "undertake a stringent and continuing examination of the adequacy of representation." Kas v. Financial General Bankshares, Inc., 105 F.R.D. 453, 462 (D.D.C. 1984). As plaintiffs recognize, two requirements have been articulated for determining the adequacy of representation: (1) the named plaintiffs must not have antagonistic or conflicting interests with unnamed class members, and (2) the named plaintiffs must be able to vigorously and competently pursue the interests of the class through qualified counsel. Twelve John Does v. District of Columbia, 117 F.3d 571, 575-76 (D.C. Cir. 1997); see also Pl. Suppl. Mem. at 133. The proceedings thus far have shown that plaintiffs cannot satisfy either criterion.

1. The Class Representatives Cannot Fairly Represent the Interests of a Class

The absence of typical claims, as discussed above, gives rise to inadequate representation because class representatives lack incentive to pursue fully the claims of the other class members. See Falcon, 457 U.S. at 158 n.13 (commonality and typicality tend to merge with adequacy of representation); American Medical, 75 F.3d at 1083 ("adequate representation requirement overlaps with the typicality requirement"). For example, named plaintiffs, who are former Bush and Reagan administration personnel, cannot fairly represent the interests of all "former U.S. government

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[15](...continued)
requirements of Rule 23, which the party seeking certification bears the burden of establishing. See McCarthy v. Kleindienst, 741 F.2d 1406, 1414 n.9 (D.C. Cir. 1984) ("it is the party seeking class certification that bears the burden of establishing the class action requirements").

employees" or of Tripp (who continues to be employed by the U.S. government).[16]

Plaintiffs' deposition testimony also demonstrates that, if any alleged injuries were caused by defendants' actions (which they were not), such injuries are of widely varying nature and degree, giving rise to conflicting interests that preclude any class-wide "adequate representation." For example, plaintiff Alexander is seeking only economic damages, and the only economic loss she has allegedly incurred is connected with prosecuting this case. See Alexander Dep. at 97-119, 121, 123-24. In contrast, plaintiff Duggan claims that he has paid over $1000 in medical expenses in connection with seeking counseling as a result of his emotional distress and insomnia. Duggan Dep. at 147, 154, 157-59. Individuals with stronger claims for relief would have incentive to litigate extensively to ensure a significant damages award, while those with only minor injuries would have an interest to push for an early settlement. Each would develop a different, conflicting litigation strategy, undermining the quality of representation that is provided to the entire class. See Commonwealth of Puerto Rico, 158 F.R.D. at 14-15 (class representatives could not adequately protect interests of class where class potentially suffered from widely varying forms of injury); Kas, 105 F.R.D. at 462 (impermissible antagonism may exist among class members when some will want different relief than others).

Because putative class members have inherently individualized claims and impermissibly divergent interests, the named plaintiffs are not adequate representatives.

2. Plaintiffs' Counsel Cannot Adequately Protect the Interests of a Class

The second criterion of the adequacy of representation requirement mandates that "attorneys in

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[16] Indeed, to date Tripp has relied on her own separate counsel, not plaintiffs' counsel, to represent her in this litigation.

class actions are held to higher standards of competence and diligence than counsel in other lawsuits because class action counsel represent not only the named clients but also all of the other members of the class, named and unnamed." Miller v. U.S., No. 79-2405, 1980 WL 18579, at *1 (D.D.C. Oct. 31, 1980); see also Palumbo v. Tele-Communications, Inc., 157 F.R.D. 129, 133 (D.D.C. 1994) ("because of the responsibility to absent class members, counsel's qualifications in the class action context are subject to a 'heightened standard'") (internal citation omitted); Kingsepp v. Wesleyan Univ., 142 F.R.D. 597, 599 (S.D.N.Y. 1992) ("The role of class counsel is akin to that of a fiduciary for the class members."). The court has the affirmative duty to carefully assess the conduct and qualifications of plaintiffs' counsel. Palumbo, 157 F.R.D. at 133; Kingsepp, 142 F.R.D. at 599.

The record in this case thus far shows that plaintiffs' counsel cannot adequately protect the interests of any proposed class. See Picard Chemical Inc. Profit Sharing Plan v. Perrigo Co., Nos. 95-CV-141/290, 1996 WL 739170, at *6 (W.D. Mich. Sept. 27, 1996) (in determining adequacy of representation, great weight is placed on counsel's conduct in the case); Williams v. Balcor Pension Investors, 150 F.R.D. 109, 112 n.1 (N.D. Ill. 1993) ("Of course, any decision about whether counsel for the putative class is adequate must be based on its handling of this case."). Plaintiffs' counsel's initial choice of class representatives reflects unfavorably on counsel's ability to represent the interests of a class. See Ballan v. Upjohn Co., 159 F.R.D. 473, 488-89 (W.D. Mich. 1994) (failure to reasonably investigate proposed class representatives, as evidenced by high withdrawal and dismissal rate, "is sufficient to find counsel inadequate"); Balcor, 150 F.R.D. at 118-20 (same). Of the eight original plaintiffs, half — Beers, Skladany, Black, and Grimley — have been dismissed from the case, either by the Court because they do not qualify for class membership, or voluntarily. Furthermore, courts

have noted that proposing an unmanageable, improperly defined, overly broad class, as in this case, "is further evidence of the inadequacy of legal representation." Miller, 1980 WL 18579, at *2.

Plaintiffs' counsel's conduct vis-a-vis the named plaintiffs in this litigation precludes them from adequately bearing the weighty responsibility of representing the interests of an entire class. Plaintiffs' counsel have consistently failed to communicate important information to, or about, their clients, thereby doing a disservice to the plaintiffs. The deposition of former-plaintiff Black revealed that plaintiffs' counsel had never informed him about correspondence and statements to the Court by government defendants representing that Black is not the David Lee Black for whom the White House obtained an FBI background summary report. Plaintiffs' counsel withheld these communications despite the fact that Black had asked his counsel to find out whether or not he is the "correct" David Lee Black. See Deposition of David L. Black (March 11, 1998) ("Black Dep.") at 225, 237 ("I've asked counsel to substantiate whether I am or not [the David Lee Black referred to in newspaper].") (excerpts at Def. Exh. 6). Learning this information for the first time at his deposition understandably caused Black to become confused and angry. See id. at 150 ("That's what I've been trying to find out. Am I the one, I don't know. You answer me. May I ask you a question?"), 200 ("Am I the same person? You've several time said - . . . What am I doing here then?"), 236 ("Now if it's not me, what the hell am I doing here?").

Plaintiffs' counsel also withheld important information from the Court with regard to plaintiff Alexander. On March 31, 1998, Alexander filed a motion for a protective order on the basis of her foregoing any claims of non-economic damages. See Plaintiff Cara Alexander's Motion for Protective Order. During Alexander's May 13, 1998 deposition, she testified that there was a strong possibility

she would reevaluate her prior position of not pursuing non-economic damages. Alexander Dep. at 95-96, 125-28. At no time did plaintiffs' counsel notify the Court that Alexander was seriously reconsidering her claims for damages, despite the risk to their client's rights. On June 15, 1998, the Court struck plaintiff Alexander's claims for non-economic damages. See June 15, 1998 Mem. & Order at 4.

Plaintiffs' counsel also has acted irresponsibly in not providing to their clients copies of their own FBI summary reports that had been released by the FBI to the White House. See Alexander Dep. at 63, 156-57 (has never seen FBI summary report); Bridgman Dep. at 51-52 ("Of course" she has not seen her FBI background investigation report); Deposition of Joseph N. Cate (June 4, 1998) ("Cate Dep.") at 145 (excerpts at Def. Exh. 7); Duggan Dep. at 81, 214-15. Plaintiffs' FBI background investigation reports were requested in discovery so that plaintiffs could have access to their own summaries. See Attachments to Letter from D.R. Bustion, II to Elizabeth Shapiro (Jan. 15, 1998) (plaintiffs' signed waivers for release of "[their] background summary report (and related material concerning [them]) to [them], through [their] counsel, for use in this litigation"); Letter from Allison Giles to Larry Klayman (Jan. 13, 1998) at 5 (referring to "the mechanism by which your clients could obtain access to their background investigation summary reports from the FBI"); Letter from Elizabeth Shapiro to Larry Klayman (Dec. 15, 1997) (same) (collectively attached as Def. Exh. 8).

At plaintiffs' counsel's request, government defendants indicated that they have no objection to plaintiffs' seeing their own FBI background summary reports. See Letter from Don Bustion to James Gilligan (May 11, 1998); Letter from James Gilligan to Larry Klayman and Don Bustion (May 12, 1998) (collectively attached as Def. Exh. 9); Alexander Dep. at 158 ("Well, let me just state for the

record that you're free to read [your FBI report] at anytime, ma'am."). Yet, plaintiff Duggan testified he was not even made aware that he is free to look at his FBI summary. Duggan Dep. at 82.

The FBI summary reports for plaintiffs Alexander, Bridgman, Cate, Duggan and Skladany, which were produced by government defendants to plaintiffs in discovery in January 1998, see Letter from Don Bustion to Elizabeth Shapiro (Jan. 20, 1998) (Def. Exh. 10), form the very gravamen of this litigation. Not only have plaintiffs' counsel failed to share this material with plaintiffs, but counsel did not inform them that they possess plaintiffs' FBI summary reports until months after the reports were produced. See Alexander Dep. at 157-58 ("I've been made aware [that counsel has copy of FBI report] just recently."); Bridgman Dep. at 54 (found out counsel has copy of FBI report sometime between mid-March and mid-May 1998).

During their depositions, several plaintiffs expressed interest in seeing information found in their FBI files. See Bridgman Dep. at 51-52; Cate Dep. at 144-45; see also Alexander Dep. at 156 ("since I've never seen my FBI report, and I don't know what's in there, which only adds to the apprehension and anxiety that I've experienced"). Counsel's failure to reveal to their clients material that plaintiffs may sincerely believe has caused them injury goes well beyond acceptable litigation strategy, and further casts doubt on plaintiffs' counsel's adequacy to represent the interests of unnamed class members.

The prerequisite of Rule 23(a)(4) is not met because putative class members' claims and interests conflict, and because plaintiffs' counsel's handling of the case has demonstrated that they cannot adequately serve the interests of a class.

F. RULE 23(B)(3) IS NOT SATISFIED BECAUSE COMMON ISSUES DO NOT PREDOMINATE OVER QUESTIONS AFFECTING ONLY INDIVIDUAL MEMBERS AND A CLASS ACTION IS NOT THE

SUPERIOR METHOD OF ADJUDICATION

Rule 23(b)(3) requires that class certification be denied unless "questions of law or fact common to the members of the class predominate over any questions affecting only individual members." In addition, plaintiffs must demonstrate that the proposed class action is the superior method of handling the claims of putative class members. Fed. R. Civ. P. 23(b)(3). Extensive discovery on the common legal and factual questions in this case has been largely completed. If a class were certified, however, the numerous individual issues in this litigation, requiring time-consuming discovery and resolution by the Court, would overwhelm the straightforward common questions still to be resolved. A class action is thus rendered an infeasible method of adjudication.

Downplaying the necessity of individualized fact-finding, plaintiffs argue that "there is no requirement that the injuries suffered by each class member be identical." Pl. Suppl. Mem. at 130 (emphasis in original) (citing Brown v. Pro Football, Inc., 146 F.R.D. 1, 4 (D.D.C. 1992) (Lamberth, J.)). Government defendants do not contend, however, that plaintiffs must prove that each class member's injuries are identical. For this reason, Brown's analysis of identical injuries and damages, relied on by plaintiffs, is not relevant to the Court's determination of the appropriateness of class treatment in this case.[17] The reason plaintiffs cannot satisfy Rule 23(b)(3)'s predominance requirement

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[17] The other cases cited by plaintiffs regarding the Rule 23(b)(3) requirement, which involve civil rights suits and constitutional challenges, are also not applicable. See Pl. Suppl. Mem. at 131. Coley v. Clinton, 635 F.2d 1364, 1378 (8th Cir. 1980), and Littlewolf v. Hodel, 681 F. Supp. 929, 935 (D.D.C. 1988), are cases in which the court certified a class under Rule 23(b)(2), which is not applicable here, and which does not contain the requirement that common issues predominate. Coley noted that Rule 23(b)(2) is construed particularly liberally in civil rights litigation. 635 F.2d at 1378. In addition, both Coley and Littlewolf involved a request for broad-based declaratory relief, in

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is that plaintiffs will have to demonstrate that each class member suffered at least some cognizable adverse effect, as a prerequisite to proving liability, and that the supposed adverse effect was caused by the government defendants' actions rather than some other source. See supra at 9, 17-18. Each class member would also have to show that a "record" concerning him or her was, in fact, disclosed by the FBI and maintained by EOP. See supra at 12-14. And, if liability is established, the amount of any "actual damages" would have to be resolved on a case-by-case basis.[18] All these determinations are inherently individualized, and would engulf the narrow issues that would be common to the entire class.

Plaintiffs also claim that "[c]lass action treatment . . . has been upheld in other Privacy Act cases." Pl. Suppl. Mem. at 128. Plaintiffs rely exclusively on Wolman v. United States, 501 F. Supp. 310 (D.D.C. 1980), remanded on other grounds, 675 F.2d 1341 (D.C. Cir. 1982), an opinion that provides no basis on which to certify a class in this case, for several reasons. First, in Wolman, there was no discussion of whether a class action is appropriate, and the opinion gives no indication that class certification was even challenged. Second, Wolman did not involve an action under Section 3 of the Privacy Act, which is at issue here, but rather Section 7, which specifies that the federal government

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[17](...continued)
contrast to the individualized nature of the relief sought in this case. And while plaintiffs in Franklin v. Barry, 909 F. Supp. 21 (D.D.C. 1995), sought monetary damages, there is no indication that ascertaining the state of mind of each putative plaintiff was a prerequisite to liability, as is the case here.

[18] In some situations, the fact that damages will have to be ascertained for each class member poses less of an obstacle to class certification because the damages can be calculated on the basis of a "simple common formula." Brown, 146 F.R.D. at 5 (the Court could calculate damages for class members by subtracting $1,000 from each member's pro rata share of the salary stated in the contract). In contrast, here, plaintiffs' adverse effects and damages cannot be ascertained by any formula.

shall not deny any rights to individuals because they refuse to disclose their Social Security numbers. 501 F. Supp. at 310 (citing Pub. L. No. 93-579, § 7 (codified at 5 U.S.C. § 552a note)).[19] Section 7 of the Privacy Act does not require that a plaintiff have suffered an "adverse effect" caused by the purported statutory violation, or that the agency have acted in an "intentional or willful" manner. Cf. 5 U.S.C. § 552a note (§ 7) with 5 U.S.C. §§ 552a(g)(1)(D) & (g)(4). Moreover, in Wolman the plaintiffs sought class-wide injunctive relief, not individual awards of damages. 501 F. Supp. at 311-12. Here, by contrast, plaintiffs must show that each plaintiff suffered an "adverse effect" and that the defendants acted in an "intentional and willful" manner as to each plaintiff, and plaintiffs are seeking individual awards of damages. See 5 U.S.C. §§ 552a(g)(1)(D) & (g)(4). Thus, as discussed more fully throughout this brief, the Privacy Act claims presented here are particularly ill-suited for class treatment.

While Wolman is inapposite, two other opinions analyzing the propriety of a class action in a suit under Section 3 of the Privacy Act are squarely on point. Courts refused to certify a class in the only two cases that government defendants have located in which the plaintiffs sought certification of a Rule 23(b)(3) class in an action under Section 3 of the Privacy Act. The court in Lyon v. U.S., 94 F.R.D. 69 (W.D. Okla. 1982), was faced with an almost identical situation as here. Plaintiff claimed that the Department of Labor had violated the Privacy Act by failing to amend a particular record upon request. The Court concluded that while some issues, such as whether the Department of Labor was an agency which maintains "records," could generally be decided for the class as a whole, the issues

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[19] Section 3 of the Privacy Act, Pub. L. No. 93-579, is codified at 5 U.S.C. § 552a et seq., while the other sections of the Act are codified in the note to § 552a.

requiring individualized consideration would predominate. Id. at 76. Specifically, "numerous 'minitrials'" would be required to determine if, for each class member, the agency had failed to maintain a record in an accurate manner, whether the agency's actions adversely affected each member's interest, and whether the agency's action in each instance was intentional or willful. Id. at 72, 76. The court held that Rule 23(b)(3) was not satisfied because of the numerous and predominant individual issues. Id. at 76.[20]

Similarly, in Wilkinson v. FBI, 99 F.R.D. 148 (C.D. Cal. 1983), the court refused to certify a class of persons about whom the FBI had allegedly collected and disseminated information in violation of the Privacy Act. Id. at 155-56. The court held that the predominance test of Rule 23(b)(3) was not satisfied, in part because each class member would have to introduce the particular government document concerning him or her into evidence. Id. Based on the well-reasoned analyses of Lyon and Wilkinson, one commentator has concluded that "[b]ecause of the individualized nature of Privacy Act violations and the adverse effects and damages that must be demonstrated in order to recover under the Act . . . class actions have usually been viewed as unsuitable." 1 George B. Trubow, Privacy Law and Practice ¶ 2.09 at 2-132 (1991). That conclusion applies with equal force in this case.

In other analogous contexts, courts have concluded that the predominance requirement is not satisfied and class certification is improper when individualized consideration would be required for one or more issues. See Castano v. American Tobacco Co., 84 F.3d 734, 745 (5th Cir. 1996) (predominance requirement of Rule 23(b)(3) cannot be satisfied in a fraud case where individual

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[20] The Lyon Court also concluded that Rule 23(a)'s typicality requirement was not satisfied. 94 F.R.D. at 75.

reliance will be an issue); McCarthy, 741 F.2d at 1415 (district court properly denied class certification to persons allegedly wrongfully arrested at a mass demonstration where individualized issues, such as whether probable cause existed for each arrest, had to be resolved); Simer, 661 F.2d at 673 (issue of whether the regulation challenged by plaintiffs was inconsistent with the authorizing statute would be common to the class, but could be expeditiously resolved by the trial court; in contrast, the issue of the effect of the allegedly illegal regulation on each class member would require individualized and time-consuming proof); Davenport v. Gerber Products Co., 125 F.R.D. 116, 119-20 (E.D. Pa. 1989); Polich v. Burlington Northern, Inc., 116 F.R.D. 258, 262-63 (D. Mont. 1987).

In this case, the class action vehicle is especially inappropriate because individualized adjudication would be required of each class member's very entitlement to bring suit — the threshold jurisdictional question of whether each plaintiff suffered an "adverse effect" as a result of the purported violation. See McCarthy, 741 F.2d at 1415 (court focuses on impropriety of a class action "where initial determinations, such as the issue of liability vel non, turns upon highly individualized facts"); Davenport, 125 F.R.D. at 120 (predominance requirement not satisfied where issues of liability needed to be resolved on an individual basis, rendering a class action unmanageable). Cf. Lewis, 146 F.R.D. at 9, 12 (typicality and predominance requirements were met where question of liability was common to the entire class).

For similar reasons, plaintiffs cannot establish that a class action would be "superior to other available methods for the fair and efficient adjudication of the controversy," which is an additional requirement of Rule 23(b)(3). See McCarthy, 741 F.2d at 1415 (class action is not the superior method of resolving the controversy where initial determinations turn upon highly individualized facts);

Simer, 661 F.2d at 668-69 (issue of each plaintiff's state of mind makes a class action unmanageable); In re Three Mile Island Litigation, 87 F.R.D. 433, 441-42 (M.D. Pa. 1980) (class action is not the superior method for adjudicating claims for physical injury related to emotional distress because such claims are "diverse and personal" and causation element will require individual proof). Moreover, the use of subclasses in this case would not alleviate the necessity of individualized adjudication, because eventually "each class member would have to testify on the matter" of adverse effect and causation. Simer, 661 F.2d at 674-75 (subclasses do not ease court's burden where each individual would have to show causation, reliance, and knowledge). Certifying a class in this case would enmesh the Court in numerous particularized questions of fact.

In sum, certifying plaintiffs' requested class would neither satisfy the explicit requirements of Rule 23(b)(3), nor serve the Rule's purpose of "achiev[ing] economies of time, effort, and expense."[21]

CONCLUSION

For these reasons, class certification should be denied and plaintiffs' class allegations should be stricken.

Dated: October 1, 1999

Respectfully submitted,

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[21] Fed. R. Civ. P. 23, Advisory Committee Notes.

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